

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

SCOTT M. KOSITI,)	
)	
Petitioner,)	Civil Action No. 05-1372
)	
v.)	Judge Lancaster
)	Magistrate Judge Caiazza
PAUL JENNINGS, <i>et al.</i> ,)	
)	
Respondents.)	

MAGISTRATE JUDGE'S REPORT AND RECOMMENDATION

I. RECOMMENDATION

It is recommended that the Petition for Writ of Habeas Corpus filed by Scott M. Kositi be dismissed and that a certificate of appealability be denied.

II. REPORT

Scott M. Kositi ("Kositi" or "the Petitioner"), a state prisoner, has filed a federal habeas corpus petition challenging his December, 2000 guilty plea to charges of Possession with Intent to Deliver a Controlled Substance and Corrupt Organizations. He is serving an aggregate sentence of seventy eight months to 156 months imprisonment.

1. Procedural History.

Kositi tendered a negotiated plea of guilty to charges of Corrupt Organizations and Criminal Conspiracy on June 13, 2000. In return, the Commonwealth dismissed the charge of Possession with Intent to Deliver and agreed not to seek a mandatory

sentence. Kositi moved to withdraw the plea prior to sentencing, the motion was granted, and trial on all charges was set for October 16, 2000. Kositi waited until a jury had been chosen and again pled guilty on October 16, 2000 -this time to all charges because the plea agreement had been withdrawn. He was sentenced on December 12, 2000, at which time he informed the court that he was "not going to go to trial for something that I did and call myself a Christian". (Doc. 25, App. B at 51).

Kositi did not seek to withdraw his second guilty plea. Instead, he sent two letters to the court, one dated December 13, 2000, and the other dated December 17, 2000, in which he questioned the accuracy of the sentencing guideline ranges for his offenses. No direct appeal was filed.

On December 12, 2001, Kositi filed a Petition pursuant to the Pennsylvania Post Conviction Relief Act ("PCRA"). 42 Pa. Cons. Stat. § 9541, *et esq.* Counsel was appointed, and an evidentiary hearing was held at which Kositi and his trial counsel testified. The trial court denied Koski's request for PCRA relief on August 20, 2002, finding, inter alia, that Kositi never requested a direct appeal and, accordingly, trial counsel did not render ineffective assistance for failing to file an appeal. The Pennsylvania Superior Court affirmed the trial court's denial of PCRA relief on August 15, 2003, and expressly held that trial counsel was not ineffective for failing to file a

direct appeal. (Doc. 19, Part 2, App. C). Kositi's subsequent Petition for Allowance of Appeal was denied by the Supreme Court of Pennsylvania on May 25, 2005.

Kositi also filed a Motion to Modify Illegal Sentence in the state courts on May 9, 2005. This Motion was ultimately denied as being untimely in January, 2006, when this petition was already pending. The Superior Court affirmed the denial of relief, finding that it was untimely, but also noted that the underlying claim of an illegal sentence lacked merit in any event. (Doc. 19, App. F).

Kositi now files the instant Petition for Writ of Habeas Corpus in which he raises numerous claims concerning the voluntariness of his guilty plea and the appropriateness and legality of his sentence.

2. Exhaustion.

Each of the Petitioner's claims could have been raised on direct appeal, but were not, save for his claim that counsel rendered ineffective assistance in failing to file an appeal. Consequently, Kositi did not fairly present his claims to the state courts since he failed to present them on direct appeal. The Petitioner, however, no longer has any procedural means to raise any claims in the state courts because he has already filed a PCRA petition, and his conviction became final more than a year ago. 42 Pa. Cons. Stat. § 9545(b)(1) (a habeas corpus petition,

even second or subsequent, must be filed within one year of the time conviction becomes final). Exhaustion may, therefore, be excused in this case. Carpenter v. Vaughn, 296 F.3d 138, 146 (3d Cir. 2002).

3. Procedural Default.

Like the exhaustion requirement, the procedural default doctrine is based upon comity and federalism. The procedural default barrier rests upon the "independent and adequate state grounds" doctrine, which dictates that federal courts will not review a state court decision involving a question of federal law if the state court decision is based on state law that is "independent" of the federal question and "adequate" to support the judgment. Coleman v. Thompson, 501 U.S. 722, 750 (1991).

A state's procedural rules are entitled to deference by federal courts, and a violation of a state procedural rule may constitute an independent and adequate state ground for denial of federal review of habeas claims. Coleman, 501 U.S. at 750. Violations of a state's procedural rules may constitute an independent and adequate state ground sufficient to invoke the procedural default doctrine, even where no state court has concluded that a petitioner is procedurally barred from raising his claims. Glass v. Vaughn, 65 F.3d 13, 15 (3d Cir. 1995), cert. denied, 516 U.S. 1151 (1996).

Federal habeas review is not available to a petitioner whose

constitutional claims have not been addressed on the merits due to procedural default, unless such petitioner can demonstrate: 1) cause for the default and actual prejudice as a result of the alleged violation of federal law; or 2) failure to consider the claims will result in a fundamental miscarriage of justice. Edwards v. Carpenter, 529 U.S. 446, 451 (2000); Coleman, 501 U.S. at 750.

Here, Kositi has properly presented only one claim to the state courts -that trial counsel was ineffective in failing to file a direct appeal. Kositi's failure to file a direct appeal caused a waiver of any other claims. Commonwealth v. Bond, 819 A.2d 33, 39 (Pa. 2002) ("Even if this Court were to assume that these two claims of trial error were not previously litigated, they would be waived under the PCRA since appellant's present theories could have been presented on direct appeal."); 42 Pa. Cons. Stat. §9544(b) (issue is waived if petitioner failed to raise it and the issue could have been raised before trial, at trial, on appeal, in habeas corpus proceeding, or in prior proceeding under PCRA).

Each of Kositi's claims, other than his claim that counsel was ineffective for not filing a direct appeal, is subject to a state court procedural default which bars review in this court, absent a petitioner satisfying the "cause and prejudice" standard. To meet the cause standard, the Petitioner must

demonstrate that some objective factor external to the defense impeded his efforts to raise the claim in state court. McCleskey v. Zant, 499 U.S. 467, 493 (1991); Murray v. Carrier, 477 U.S. 478, 488 (1986). Kositi's sole proffered explanation for his failure to properly raise his claims in the state court is that trial counsel failed to act on a request for an appeal which caused the procedural default.

Ineffective assistance of counsel may constitute cause for procedural default. However, neither a deliberate strategic decision nor an inadvertent failure of counsel to raise an issue constitutes "cause", unless counsel's performance failed to meet the Sixth Amendment standard for competent assistance. Engle v. Isaac, 456 U.S. 107 (1982); Carrier, 477 U.S. at 485-87. Further, counsel's ineffectiveness will not constitute cause where the issue not raised lacks merit. See Diggs v. Owens, 833 F.2d 439, 446 (3d Cir.1987) (appellate counsel did not render ineffective assistance where issues not raised on appeal were without merit); United States v. Cook, 45 F.3d 388, 392 (10th Cir. 1995) (same). Thus, it is Kositi's burden to establish that counsel rendered ineffective assistance in failing to file a direct appeal before he can establish cause for his procedural default.

The standard applicable to this case was explained in Lewis v. Johnson, 359 F.3d 646 (3d Cir. 2004):

[C]ounsel [must] advise the defendant about an appeal when there is reason to think either (1)

that a rational defendant would want to appeal (for example, because there are nonfrivolous grounds for appeal), or (2) that this particular defendant reasonably demonstrated to counsel that he was interested in appealing. [The Petitioner] pleaded guilty and does not seek to appeal from a jury trial. The Supreme Court has held this is a highly relevant factor in deciding whether counsel was duty-bound to advise a defendant about his appellate rights, though the fact of a guilty plea is not dispositive. In guilty-plea cases, our Strickland analysis must consider such factors as whether the defendant received the sentence bargained for as part of the plea and whether the plea expressly reserved or waived some or all appeal rights.

Lewis, 359 F.3d at 660 (internal citations and quotations omitted).

Here, Kositi twice entered guilty pleas to criminal charges -the second coming after a jury had already been seated, and only after a lengthy colloquy during which he assured the trial judge he was entering the plea knowingly and voluntarily. (Doc. 25, App. A). Kositi repeatedly admitted his guilt on the record. This was neither a rash decision, nor hurried. Furthermore, the state court has expressly ruled, after an evidentiary hearing, that Kositi did not request that a direct appeal be filed on his behalf. (Doc. 19, Appendices A and C).

Finally, Kositi has failed to identify a single claim which would have been successful on appeal. Once entered, a defendant does not have an absolute right to withdraw a guilty plea. United States v. Isaac, 141 F.3d 477, 485 (3d Cir. 1998).

Rather, a plea of guilty entered by one fully aware of the direct consequences must stand unless induced by threats, misrepresentation, or improper promises. Mabry v. Johnson, 467 U.S. 504, 509 (1984). It is only when a defendant is not fairly apprised of the direct consequences of pleading guilty that he may challenge his guilty plea under the Due Process Clause. Id. The state courts here properly concluded that Kositi's guilty plea was knowing and voluntary. Hence, he is not entitled to withdraw his plea. Also, with respect to the sentencing claims Kositi presently raises, the Pennsylvania Superior Court has ruled as a matter of state law that he was not sentenced illegally. Therefore, counsel could not have rendered ineffective assistance in failing to file a direct appeal, and Kositi has, accordingly, not established "cause" for his failure to file a direct appeal.

Because Kositi has failed to establish cause for his procedural defaults, the Court need not consider the question of actual prejudice. See Carrier, 477 U.S. 478, 495 (1986).

Although Kositi cannot demonstrate the necessary "cause", this court may nevertheless review his claims if he can show that a "fundamental miscarriage of justice would result from a failure to entertain the claim." McCleskey, 499 U.S. at 495. This court may use its discretion to correct a fundamental miscarriage of justice if it appears that a "constitutional violation probably

resulted in the conviction of one who is actually innocent." Murray, 477 U.S. at 496. See also Coleman, 501 U.S. at 748; McCleskey, 499 U.S. at 502. This is not the case here since Kositi does not assert innocence; he only wants to withdraw his (second) guilty plea and proceed to trial. Kositi is not entitled to the "miscarriage of justice" exception to the procedural default doctrine and review of all of his claims, except his claim that counsel was ineffective for failing to file a direct appeal, is barred.

Lastly, for the reasons set out here, the sole claim which was not procedurally defaulted, *i.e.*, Kositi's claim that counsel was ineffective for not filing a direct appeal, lacks merit.

4. Certificate of Appealability

"A certificate of appealability may issue . . . only if the applicant has made a substantial showing of the denial of a constitutional right." 28 U.S.C. §2253(c). Because Kositi has not satisfied his burden, a certificate of appealability should be denied.

In accordance with the Magistrates Act, 28 U.S.C. § 636(b)(1)(B) & (C) and Local Rule 72.1.4 B, the Petitioner is allowed ten (10) days from the date of service to file written objections to this Report. Objections are due on or before May 23, 2007. Failure to timely file objections may constitute a

waiver of any appellate rights.

s/Francis X. Caiazza
Francis X. Caiazza
United States Magistrate Judge

Dated: May 7, 2007

CC:
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